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Canada's Indians - Federal Policy, Inter
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CANADA'S INDIANS – FEDERAL POLICY
INTERNATIONAL AND CONSTITUTIONAL LAW

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PREFACE

by the Honourable Harry E. Strom, Premier of Alberta.

Early in 1969, the Federal Government issued a policy position paper, outlining their proposals for legislation and programs affecting Indians.

At that time the Government of Alberta stated its position as follows: It would not enter the discussions directly; rather it would encourage Alberta Indians to develop and articulate their own position and enter into negotiations with the Federal Government.

Although we now take essentially the same attitude, we have been reviewing the position of our Indian citizens. As a part of this review, we retained L. C. Green, Professor at the University of Alberta, to write a critique of the Federal paper.

We present this paper to all interested in the question, and we hope that it will be a useful contribution to the continuing discussion.

Canada's Indians — Federal Policy, International and Constitutional Law

L. C. Green

The 1969 Statement of the Government of Canada on Indian Policy is based on the assumption that any legislation which sets a particular segment of the population apart from the main stream of the citizenry is ipso facto conducive to a denial of equality and therefore discriminatory and to be deplored. Such an attitude indicates a complete lack of understanding of the significance of the concept of equality, particularly in so far as the law concerning the protection of minorities is concerned.

Problems of this kind have arisen on both the international and the municipal level. In so far as the former is concerned, minority protection became a major problem after the first world war with the establishment of multinational States in Europe, and the draftsmen of the peace treaties as well as of the Covenant of the League of Nations were concerned to see that no national group suffered adverse discrimination on account of its being a minority within an alien area. The Permanent Court of International Justice had occasion to examine the concept of equality for minorities and the definition it adopted may serve as a standard of measurement for any system of law. On the one hand the Court examined the nature of a minority community, holding that a " 'community' is a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other. . . Communities are of a character exclusively minority and racial, . . . (and their) existence . . . is a question of fact; it is not a question of law"[1].

It is in this last refrence to fact and law that a clue is to be found as to the nature of equality, for the Minorities Treaties guaranteed "to racial minorities the same treatment and security 'in law and fact' as to other . . . nationals. The fact that no racial discrimination appears in the text of the law . . ., and that in a few instances the law applies to (non-minority) nationals . . . makes no substantial difference. . . There must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law[2]. . . (T)he prohibition against discrimination, in order to be effective, must ensure the absence of discrimination in fact as well as in law. A measure which in terms is of general application,

1. **Greco-Bulgarian 'Communities'** (1930) Series B/17, pp. 21, 30, 22 (2 Hudson, **World Court Reports,** 1935, pp. 653-4, 660, 654).
2. **German Settlers in Poland** (1923) Series B/6, p. 24 (1 Hudson, 1934, p. 218).

but in fact is directed against (in this instance) Polish nationals and other persons of Polish origin or speech, constitutes a violation of the prohibition. . . Whether a measure is or is not in fact directed against these persons is a question to be decided on the merits of each particular case. . . The object of the prohibition is to prevent any unfavourable treatment, and not to grant a special régime of privileged treatment[3] . . . It is perhaps not easy to define the distinction between the notions of equality in fact and equality in law; nevertheless, it may be said that the former notion excludes the idea of a merely formal equality. . . Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to obtain a result which establishes an equilibrium between different situations. It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact; treatment of this description would run counter to (the minorities régime). The equality between members of the majority and of the minority must be an effective, genuine equality; that is the meaning of the (requirement). . . Far from creating a privilege in favour of the minority, . . . (a) stipulation (in favour of minority rights, e.g. schools) ensures that the majority shall not be given a privileged situation as compared with the minority. . . The expression 'equal right' must be construed on the assumption that the right stipulated must always be accorded to the members of the minority. The idea embodied in the expression 'equal right' is that the right thus conferred on the members of the minority cannot in any case be inferior to the corresponding right of other . . . nationals. In other words, the members of the minority must always enjoy the right stipulated . . ., and, in addition, any more extensive rights which the State may accord to other nationals. The right provided . . . is in fact the minimum necessary to guarantee effective and genuine equality as between the majority and the minority; but if the members of the majority should be granted a right more extensive than the right which is provided, the principle of equality of treatment would come into play and would require that the more extensive right should also be granted to the members of the minority"[4].

In the sphere of national jurisprudence, perhaps the clearest manifestation of this concept of equality is to be found in the attitude of the Supreme Court of the United States towards the idea of 'separate but equal'. The origin of this idea is to be found in Plessy v. Ferguson[5] in which it was specifically pointed out that "a statute which implies merely a legal distinction between the . . . races has no tendency to destroy the legal equality

3. **Treatment of Polish Nationals in Danzig** (1932) Series AB/44, pp. 28-29 (2 Hudson, 1935, pp. 807-8).
4. **Minority Schools in Albania** (1935) Series AB/65, pp. 19, 20 (3 Hudson, 1938, pp. 498, 499-500).
5. (1896) 163 U.S. 537, 550.

of the two races". If, therefore, "the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically", and as a result the provision of separate facilities was not considered to be inconsistent with equal rights. That was in 1896; but in 1954 in Brown v. Board of Education[6] the Supreme Court rejected the whole 'separate but equal' doctrine. The case concerned the constitutionality of separate schools for whites and blacks, even though equalization of the facilities had taken place. The Court put the basic issue in simple terms: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. . . (I)n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the" Constitution. Judicial practice since then has shown that this veiw is not confined to education.

So far, discussion has been confined to the situation which arises when the rights of a minority have been adversely affected by actions taken in the name of equality and directed towards the achievement of formal equality, regardless of whether real equality ensues or not. In other words, attention has been directed towards the negative problem of denial of rights in so far as a minority is concerned. It may happen, however, that for reasons of a historical nature a minority group—and the term is here used in a sense wide enough to cover a numerical majority which finds itself economically or politically deprived in comparison with a privileged minority—can only achieve equality if positive rights are accorded to it, even though this may result in apparently placing the group in a privileged position since it enjoys rights over and above those enjoyed by the rest of the population. Thus the Indian Constitution, 1949[7], recognizes that there are 'socially and educationally backward classes' in India and by the Fifth Schedule of the Constitution regulations may be made prohibiting or restricting transfers of land by or among members of the Scheduled Tribes within a classified area, or regulating the allotment of land to such people or the activities of money-lenders among them. While the Supreme Court of India is active in defending the rights of the Indian people and in condemning inequalities and discriminations, it has never seen any ground for criticising the protective measures that have been provided on behalf of the Scheduled Peoples. The provisions

6. 347 U.S. 483, 491-492.

7. Peaslee, **Constitutions of Nations**, vol. 2, 1966, p. 308 (Sch. V is reproduced in Basu, **Commentary on the Constitution of India**, vol. 2, 1956, p. 651).

of the Constitution of Malaysia, 1957/64,[8] are even more far-reaching, for these are directed to the improvement of the lot of the Malays who constitute the majority of the population. Thus, while Article 12 is directed against religious discrimination and specifically relates to educational institutions, it provides that "federal law or State law may provide for special financial aid for the establishment or maintenance of Muslim institutions or the instruction in the Muslim religion of persons professing that religion." This appears to be somewhat at variance with Article 8 which declares that "all persons are equal before the law and entitled to the equal protection of the law . . . This Article does not invalidate or prohibit . . . any provision for the protection, wellbeing or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service." The most far-reaching section of this kind is Article 153 which instructs the Head of State "to safeguard the special position of the Malays and the legitimate interests of other communities." To this end, he is to exercise his functions "In such manner as may be necessary to safeguard the special position of the Malays and to ensure the reservation for Malays of such proportion as he may deem reasonable of positions in the public service". He is similarly authorised to reserve a proportion of any licenses or permits that may be required by federal law for the operation of any trade or business, and "ensure the reservation for Malays of such proportion as he may deem reasonable . . . of scholarships, exhibitions and other similar education or training privileges or special facilities gven or accorded by the Federal Government."

It would thus appear that neither India nor Malaysia has the same inhibitions as has the Canadian federal Government as to the compatibility with the concept of equality of legislation directed at preserving the rights of particular groups, even when such legislation has to be drafted in the form of positive concessions appearing to place the group in question in a protected position. The 1969 Statement of the Government of Canada on Indian Policy appears to confuse protection with discrimination. It assumes that any legislation which sets a people apart, regardless of the purpose it is intended to serve, is of necessity a denial of equality and an example of discrimination which can only serve to breed discrimination. It may well be that in the practice of the legislation relating to Indians the law enforcers, be they members of the administration or of the police, have indulged in discriminatory treatment which has led the general public to assume that such treatment is proper and normal. The fact that administrators abuse their function or misinterpret or misapply the law under which they purport to act does not mean that law itself is defective nor that it is discriminatory.

8. **Ibid.**, p. 652.

Just as the Statement ignores the true meaning of equality in the legal sense, so it assumes that any form of different treatment is discriminatory and therefore bad. Only draftsmen ignoring the meaning of concepts and unaware of the role of their own country on the international level could have made such an error. As long ago as 1963 Canada voted in favour of the United Nations General Assembly's Declaration on the Elimination of All Forms of Racial Discrimination[9] and in 1966 voted in favour of the adoption of the International Convention on the Elimination of All Forms of Racial Discrimination[10], although the constitutional separation of powers has delayed ratification[11]. Those responsible for dealing with the Statement on Indian Policy might, therefore, be well advised to look again at paragraphs 1 and 4 of the Convention:

> "1. In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. . . .
>
> "4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

It is clear, therefore, that there is no question of racial discrimination involved when the purpose of legislation concerning a group is directed to enabling that group to take its full part in the national life, while recognizing as a practical situation that while the legislation subsists the group is disadvantaged and requires protective legislation to bring it up to the same level as the rest of the population. The only condition is that the legislation must terminate when the equality is achieved and the special measures are as a result no longer necessary. The Statement on Indian Policy states that "it cannot be accepted now that Indians should be constitutionally excluded

9. Res. 1904 (XVIII), UN **Yearbook on Human Rights for 1963,** p. 415.
10. Res. 2106 (XX), 5 **International Legal Materials,** 1966, p. 350 (italics added).
11. H. C. Deb. (Canada) 1966, vol. IV, 4378-9 (reply by Mr. Martin to Question 1303).

from the right to be treated . . . as full and equal citizens with all the responsibilities and all the privileges that this might entail." At first blush, such a statement may be considered completely unexceptionable. However, it would not remain so if it runs counter to any vested interests that the Indians might already possess, while an examination of its practical consequences might suggest that it leaves much to be desired. It will suffice to take but one example referred to in the Statement. The Statement comments that "the economic base for many Indians is their reserve land, but the development of reserves has lagged. . . The transfer of Indian lands to Indian control should enable many individuals and groups to move ahead on their own initiative." It must be borne in mind, though, that "private investors have been reluctant to supply capital for projects on land which cannot be pledged as security." The philosophy underlying this seems to be, in direct contrast to that embodied in the Constitution of India, to enable those who by reason of lack of sophstication or of education are in a position of inequality vis-à-vis large undertakings to lose the one source of wealth and security which they may possess. Regardless of political or economic ideologies that may be involved, the experience of England during the Industrial Revolution, of Ireland in the hungry forties, of poor whites in the American south and of Canadian farmers during the depression should be sufficient warning against lightly accepting what purports to be a policy of freedom—but which may amount to no more than the freedom to starve.

Reference has been made to possible existence of Indian vested interests. Such interests would arise through the group of documents known collectively as Indian Treaties. Before attempting to examine the contents of these documents it is necessary to analyse their legal nature. In other words, are they in fact treaties? According to the definition adopted by the United Nations in the Vienna Convention on the Law of Treates[12] a 'treaty' is "an international agreement concluded betwen States in written form and governed by international law, whether embodied in a single instrument or two or more related instruments and whatever its particular designation". Since the Indians cannot be considered to constitute a State it is clear that any document signed with them would be excluded from this definition. The definition, however, is one for today and it is necessary to see what the position of the Indians and their documents was at the time of signature. To some extent, the practice of the United States throws light upon the situation, for the Indians in that country also entered into relations with, first, the British Government and later the federal Government and roughly at the same time as similar relations were being entered into with the Canadian Indians. In 1871 the Indian Appropriations Act provded that "hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or

12. 8 **International Legal Materials,** 1969, p. 679.

recognised as an independent nation, tribe or power with whom the United States may contract by Treaty"[13]. From then on they were regarded as wards of the nation[14], although prior to this there was a tendency, while denying them sovereignty, to recognize their treaty-making power. A typical statement by the Supreme Court appears in its judgment in Worcester v. State of Georgia[15] "Great Britain (to which the United States succeeded) . . . considered (the Indians) as capable of maintaining the relations of peace and war; of governing themselves under her protection; and she made treaties with them, the obligation of which she acknowledged." This tendency to speak of 'treaties' is a little strange in view of the general attitude adopted by the Court that the Indians never constituted a nation and that if they did their nationhood was extinguished by the British conquest, so that it would appear that the treaties made with them after that date are nothing more than contracts between a sovereign and a group of its subjects. Only a year earlier, in Cherokee Nation v. State of Georgia,[16] Marshall C. J. had described them as being in a 'state of pupilage', holding that any attempt by a third State to allyitself with them would amount to a hostile act, while Johnson J. pointed out that "when this country was first appropriated or conquered by the crown of Great Britain, they certainly were not known as members of the community of nations; and if they had been, Great Britain considered them as her subjects whenever she chose to claim their allegiance; and their country as hers, both in soil and sovereignty. All the forbearance exercised towards them was considered as voluntary." Nevertheless, "laws have been enacted in the spirit of (the) treaties"[17].

The treaties between the United States and her Indians have not only been subject to interpretation by municipal tribunals. In the Cayuga Indians Claim, 1926[18], the American-British Claims Commission had to consider the effect as regards Cayugas who had settled on the Canadian side of the border of treaties entered into with that Nation by the State of New York between 1789 and 1795 as well as the Treaty of Ghent between the United States and Great Britain, 1814. The tribunal pointed out that the tribe had never constituted a unit under international law and had always been treated as under the protection of the power occupying its land, and that "the 'Cayuga Nation', with which the State of New York contracted in 1789, 1790 and 1795, so far as it was a legal unit, was a legal unit of New York law. . .

13. 16 Stat. 566, 25 USCA, s. 71.
14. See, e.g., **U.S. v. Kagama** (1886) 118 U.S. 375, at 383-4, **per** Miller J. Even as early as 1831, Marshall C. J. was talking of them as being 'in a state of pupilage', **Cherokee Nation v. Georgia** 5 Pet. 1, 17.
15. (1832) 6 Pet., 515, at 548 **per** Marshall C. J.
16. **Loc. cit.,** n. 14, at 17, 18, 25.
17. **Ibid.,** p. 15, **per** Marshall C. J.
18. 6 U.N. **Reports of International Arbitral Awards,** pp. 173, 177, 187, 177.

(The 1789) treaty was made at a time when New York had authority to make it, as successor to the Colony of New York and to the British Crown", and the Arbitral Tribunal applied similar reasoning to the position of Canada, pointing out that the Canadian Cayugas "were and are dependent upon Great Britain, or later upon Canada, as the New York Cayugas were dependent on and wards of New York". The Tribunal held that as the treaty was in the nature of a contract between New York and the Cayugas and was within New York's competence, there was no direct liability upon the United States. The latter was liable not because of the Indian treaties, but because of the Treaty of Ghent, and it was liable not to the Indians with whom the original commitment had been made, but to their sovereign which could, at its discretion, have decided to keep for itself the $100,000 awarded.

It was not only with North American Indians that treaties were made in the eighteenth and nineteenth centuries, and occasionally they were made by trading companies in their own behalf, although by the twentieth century the rights obtained by the companies had been acquired by the government of the country of which they were chartered. Both the British and East Indian Companies operated in this way, and perhaps the best statement concerning the legal nature of such treaties is to be found in the award of Max Huber sitting as sole arbitrator in the Permanent Court of Arbitration when dealing with the Island of Palmas dispute between the Netherlands and the United States:[19]

> "As regards contracts between a State or a Company such as the Dutch East India Company and native princes or chiefs of peoples not recognized as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties. But, on the other hand, contracts of this nature are not wholly void of indirect effects on situations governed by international law; they are none the less facts of which that law must in certain circumstances take account."

It is true that the effect of this statement is merely to recognize the rights under such agreements of the State which has entered into them, or which has succeeded to the trading company which negotiated with the native people. It does not recognize the rights of the people involved. In fact, since these people are 'not recognized as members of the community of nations' they have, strictly speaking, no rights in international law whatever. This became clear in the Eastern Greenland Case[20] in which the Permanent Court of International Justice held that even when the indigenous inhabitants, in

19. (1928) 2 **Ibid.**, p. 831, at p. 858 (italics in original). As to the representative character of the Hudson Bay Co. in this respect, see **R. v. Bob and White** (1965) 50 D.L.R. (2d) 613, 617, 652.

20. (1933) Series AB/53 (3 Hudson, p. 151, at p. 171).

this case the Eskimos of the area, managed to exterminate the settlers and destroy their settlements this did not destroy the title of the settling power, for "conquest only operates as a cause of loss of sovereignty when there is war between two States and by reason of the defeat of one of them sovereignty over territory passes from the loser to the victorious State".

Similarly, refusals to recognize the treaty rights of native peoples are to be seen in the attitude of the United Kingdom towards the treaties of protection when it has been decided that the treaty territory in question should be joined to a nearby colonial territory to form a new independent State within the Commonwealth, as has happened in Africa. In no case have the original native signatories of the treaty of protection been able to prevent a transfer of their territory or to asert that, with the United Kingdom's abandonment of protection, the purpose for which the treaty was drafted has terminated and that therefore the treaty is no longer valid and they are once again independent[21]. As early as 1926, the Judicial Committee of the Privy Council had held that, in so far as Swaziland was concerned, "the limitation in the Convention of 1894 on interference with the rights and laws and customs of the natives cannot legally interfere with a subsequent exercise of the sovereign powers of the crown. . ."[22] Nevertheless, it must be remembered that when legal documents are drawn up with unsophisticated peoples it would be inequitable and smacking of fraud to insist too rigidly on the technical meaning of the language used. Thus, in Jones v. Meehan[23]:

> "In construing any treaty between the United States and an Indian tribe, it must always . . . be borne in mind that the negotiations for the treaty are conducted on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various estates known to their law, and assisted by an interpreter employed by themselves; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States[24]; the treaty must therefore be construed not

21. See, e.g., the problems concerning Uganda and Buganda, Cmnd. 1523 (1961), para. 14.

22. **Sobhuzza II v. Miller** [1926] A.C. 518, 528.

23. (1899) 175 U.S. 1, 11 (per Gray J.).

24. In Canada, in some of the negotiations the Indians were able to employ their own interpreter who, in one case at least, became an official interpreter for the Government, see the personal record of Peter Erasmus in Alberta, **Buffalo Days and Nights** (unpublished ms.).

according to the technical meaning of the words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

More recently, Lord Asquith of Bishopstone acting as arbitrator in the Abu Dhabi case [25] made exactly the same point. He had to interpret in 1951 a contract drawn up English and an archaic variety of Arabic which had about as much relation to the modern language 'as Chaucer's English does to modern English'. Moreover, the dispute related to petroleum rights in the continental shelf, a concept of commerce and law which had been undreamed of when the contract was drawn up in 1939. The abritator found that there was no local law that he could apply and that English law as such was inapplicable. In his view, "the inquiry extends at large to what each of the parties meant them to mean, and how and why each phrase came to be inserted." He was dubious about the application of individual maxims of law, for instance "the rule that grants by a sovereign are to be construed against the grantee. (This) is an English rule which owes its origin to incidents of our own feudal polity and royal prerogative which are now ancient history; and its survival, to considerations which, though quite different, seem to have equally little relevance to conditions in a protected State of a primitive order of the Persian Gulf. . . (As to the then unknown continental shelf doctrine,) directed, as I apprehend I am, to apply a simple and broad jurisprudence to the construction of this contract, it seems to me that it would be a most artificial refinement to read back into the contract the implications of a doctrine not mooted till seven years later. . ." Before leaving this award, perhaps it should be pointed out that in the text of the contract it was provided that the agreement was to be executed 'in a spirit of good intentions and integrity, and to (be interpreted) in a reasonable manner'. This enabled Lord Asquith to state that "the terms of (the contract) invite, indeed prescribe, the application of principles rooted in the good sense and common practice of the generality of civilised nations—a sort of 'modern law of nature'."

Many of the arbitrator's comments would appear applicable to the type of agreement that was entered into between the representatives of the Crown and the Indians, and presumably an equal modicum of good faith and good sense is essential in interpreting them. This is particularly true if one bears in mind that true equality between the parties never existed and that behind the façade of free discussion was the reality that what the British negotiators wanted was what the Indians would have to concede. This becomes clear from the report of the negotiations between Governor Morris and the Cree Indians in 1876 at Carlton and Fort Pitt. According to the

25. **Petroleum Development Ltd. v. Sheikh of Abu Dhabi** (1951) 18 Int. Law Rep., pp. 144, 149, 150, 152, 149.

record left by Peter Erasmus who acted as interpreter,[26] the Governor explained that it was not within his powers to add any claim to the draft treaty which he had put forward—"But I will bring your request before the House at Ottawa. However I know it will not be accepted." Despite a careful interpreter, Chief James Serum assumed that since the Governor had said he would refer his request for territorial adjustments to Ottawa, this was a promise of fulfilment.

There does not appear to be the same room for misunderstanding in another of the Governor's pledges: "They would be at liberty to hunt and trap on Government lands the same as before. Nor would they be compelled to go to war except on their own free will. A medicine chest would be placed in the house of every agent for the free use of the band"[27]. As has been seen, the Privy Council has not felt that such a treaty inhibited the freedom of Crown action at a later date, and this is particularly so in the international field in which the Crown might undertake obligations which are incompatible with the literal fulfilment of such an earlier undertaking[28]. In the same way, municipal life does not stand still and it may be necessary for later legislation intended to be of general application to be subjected to an interpretation that runs counter to what might formerly have been regarded as Indian rights. Thus, in R. v. The St. Catherine Milling & Lumber Co.[29] Taschereau J. pointed out that "the necessary deduction from such a doctrine (that a legal Indian title existed as against the Crown) would be, that all progress of civilization and development in this country is and always has been at the mercy of the Indian race. Some of the writers . . ., influenced by sentimental and philanthropic considerations, do not hesitate to go as far. But legal and constitutional principles are in direct antagonism with their theories. The Indians must in the future, every one concedes it, be treated with the same consideration for their just claims and demands that they have received in the past, but, as in the past, it will not be because of any legal obligation to do so, but as a sacred political obligation, in the execution of which the state must be free from judicial control". However, as the Privy Council pointed out in confirming this judgment, "the tenure of the Indians was a personal and usufructuary right depending upon the goodwill of the sovereign"[30], and the 1763 Proclamation from which all Indian rights originally spring makes it clear that they are reserved for the Indians 'for the present', and describes them as "Indian tribes then living under the sovereignty and protection of the British Crown".

26. **Op. cit.,** n. 24 above, pp. 264, 266.
27. **Ibid.,** p. 258.
28. See, e.g., **R.** v. **Sikeya** (1964) 46 W.W.R. 65 (C.A.), [1964] S.C.R. 642 (S.C.), and **R.** v. **George** (1966) 55 D.L.R. (2d) 386, re Migratory Birds Convention, 1916, between United Kingdom (on behalf of Canada) and United States.
29. (1887) 13 S.C.R. 577.
30. (1889) 14 App. Cas. 46, 55.

The content of this 'political obligation' has been variously interpreted by the Courts. In R. v. Wesley[31] McGillavray J. A. held that the Alberta Game Act did not interfere with the Indians' treaty rights to hunt, for the treaty had to be interpreted "with the exactness which honour and good conscience dictate . . . It is satisfactory to be able to come to this conclusion and not to have to decide that 'the Queen's promises' have not been fulfilled. It is satisfactory to think that the legislators have not so enacted but that the Indians may still (in the words of the Proclamation) be 'convinced of our justice and determined resolution to remove all reasonable cause of discontent'." In the Sikyea case[32], however, Johnson J. A., drawing attention to the words of Governor Morris at the signing of the Qu'appelle treaty: "Therefore, the promises we have to make you are not for today only but for tomorrow, not only for you but for your children born and unborn, and the promises we make will be carried out so long as the sun shines above and the waters flow in the ocean", pointed out that it appeared 'likely that these obligations under the treaties were overlooked' when the legislation had been drawn up, and he regretted his inability to repeat the words of McGillavray J. A.

Perhaps the most telling statement with regard to the treaties and their significance was made by Patterson, (Acting) Co.Ct.J., in R. v. Syliboy[33], a case which has frequently been cited as the leading authority on the meaning of the Indian treaties:

> " 'Treaties are unconstrained acts of independent persons.' But the Indians were never regarded as an independent power. A civilised nation first discovering a country of uncivilised persons or savages held such country as its own until such time as by treaty it was transferred to some other civilised nation. The savages' right of sovereignty even of ownership was never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.
>
> "Indeed the very fact that certain Indians sought from the Governor the privilege or right to hunt in Nova Scotia as usual shows that they did not claim to be an independent nation owning or possessing their lands. If they were, why go to another nation asking the privilege or right and giving promise of good behaviour that they might obtain it? In my judgment the treaty of 1752 is not a treaty at all and is not to be treated as such; it is at least a mere agreement

31. [1932] 2 W.W.R. 337, 351, 353.
32. **Loc. cit.**, n. 28 above, pp. 69-70, 74.
33. [1929] 1 D.L.R. 307, 313-314 (italics added).

made by the Governor and council with a handfull of Indians giving them in return for good behaviour food, presents, and the right to hunt and fish as usual—an agreement that . . . was very shortly after broken (by Indian raids). . .

"Having called the agreement a treaty, and having perhaps lulled the Indians into believing it to be a treaty with all the sacredness of a treaty attached to it, it may be the Crown should not now be heard to say it is not a treaty. . . That is a matter for representations to the proper authorities—representations which . . . could hardly fail to be successful."

It is difficult to disagree with Patterson's view that the Crown is at least morally bound to give effect to what its representatives held out as promises and binding obligations, and what were regarded by the Indians with whom they were negotiating as such. Particularly is this so, when government after government, court after court and commentator after commentator over the course of 100 years or more have described these agreements as if they were treaty-like in character, and have to all intents and purposes not been contradicted. In other words, even if they are not treaties in the strict sense of that term, it is difficult to argue that the Indians have not acquired a vested claim to what was held out to them then as a right being conferred by the particular treaties. This would mean that the contents of any particular agreement should be construed in the way it was understood by both parties at the time at which it was made, and in accordance with the contra proferentem rule should be interpreted on behalf of the one who was induced to enter the agreement on the basis of the promise, and against the party putting it forward. Nevertheless, as Rand J. pointed out in Francis v. The Queen[34], while "appreciating fully the obligation of good faith toward these wards of the state, there can be no doubt that the conditions constituting the raison d'être of the clause were to have been considered such as would in foreseeable time disappear. That a radical change of this nature brings about a cesser of such a treaty provision appears to be supported by the authorities available." In the same case, Kellock J. emphasised that there were at least two different meanings to the term 'treaty', the one international relating to agreements between states, and the other of a special kind applicable to the agreements with Indians dealt with in the Indian Act[35]. Even if this be true, the view of the Judicial Committee of the Privy Council in Att. Gen., Canada v. Att. Gen., Quebec and Att. Gen., Ontario[36] that the agreements created a 'contract liability' must be kept in mind.

34. [1956] S.C.R. 618, 629, 631.
35. R.S.C. 1952, chap. 149 as amended.
36. [1897] A.C. 199, 213.

However, the principle rebus sic stantibus by which a fundamental change in circumstances is recognised as being sufficient ground to invalidate or frustrate an agreement is not one which may be invoked subjectively and unilaterally. It is an equitable principle and its application should be conditioned by considerations of good faith and equity. This calls to mind the reasoning of Teschereau J. and Lord Asquith, as well as the rule of temporal interpretation. While the existence of a right should be considered in the light of the situation that existed at the time of its alleged creation, the content of the right should be examined at the time of interpretation. In this way, innovations and changes in circumstance not going to the very root of the right may be taken into consideration, and the liability brought into line with current needs and realities. As an example of this, reference may be made to the medicine chest to be maintained by the Indian agent. Notwithstanding anything that might have been said in R. v. Johnston[37] or Re Manitoba Hospital Commission and Klein and Spence[38], the comment of Angers J. in Dreaver v. The King[39] appears to be in accordance with good faith, common sense and the traditional rules of interpretation: "The clause might unquestionably be more explicit, but . . . I take it to mean that all medicines, drugs or medical supplies which might be required by the Indians, . . . were to be supplied to them free of charge." This is merely another way of saying that, allowing for the changes that have taken place in the nature of government and of public medical services, what was then meant by a medicine chest would today be understood as a State medical service, while the house of the agent would be the equivalent of a government office.

From what has been said, it should be evident that in so far as the Indian treaties are concerned it matters little what their content is, nor is their title significant. A treaty is an agreement between independent powers giving rise to legal rights and obligations inter se. For this reason it has been suggested by some that there is something incongruous in the thought of a treaty between a State and its own subjects, intimating that the Indian treaties would be unique if they were indeed treaties and arguing, a contrario, that since they would be unique such arrangements do not occur. This is to ignore such instruments as the Irish Free State Treaty, 1921, which was registered with the Secretariat of the League of Nations as an international instrument in 1924,[40] even though the British Government objected to its registration. It was not contended that the instrument was not a treaty, but that neither the League Covenant, under which the registration had been effected, "nor any convention concluded under the suspices of the League

37. (1966) 56 D.L.R. (2d) 749.
38. (1969) 4 D.L.R. (3d) 522.
39. Ex. Ct. of Toronto, unreported (cited **loc. cit.**, n. 38, p. 528).
40. 26 L.N.T.S., p. 9 — the British protest and the Irish rejoinder are to be found in **27 ibid.**, p. 449.

are intended to govern the relations inter se of the various parts of the British Commonwealth". In fact, appearing before the Judicial Committee in Moore v. Attorney-General for the Irish Free State[41] the British Attorney-General stated that "it would be a breach of treaty obligations if the Irish Free State legislature were to do away with the Treaty", while in the House of Lords Lord Hailsham argued that "the Irish Free State derived its status from the Treaty (which had been drawn up between the English Government and its subjects in southern Ireland), which therefore imported obligations for the Irish Free State, which could not be set aside by an exercise of its legislative power, enlarged by the Statute of Westminster"[42]. This is not the only example of an agreement signed between Great Britain and a Commonwealth member before the passage of the Statute of Westminster. As a result of the recommendation of the 1930 Imperial Conference a British Commonwealth Shipping Agreement was adopted in 1931 and registered with the League of Nations by the Union of South Africa[43].

Of more significance perhaps is the Lateran Treaty of 1929[44]. After the Italian annexation of the Papal States and the establishment of Rome as the capital of Italy in 1870 the Pope's legal position depended upon an Italian Statute, the Law of Guarantee, which gave him certain privileges, but subjected him like any other national to the Italian civil courts. The fact that Italy tolerated a situation in which the Pope carried on diplomatic relations with other States did not affect the Pope's position vis-à-vis Italy, although the foreign States in question might have recognised the Holy See as an independent State. When, therefore, the 1929 Treaty was signed "permanently assuring to the Holy See a position de facto and de jure which shall guarantee absolute independence for the fulfilment of its exalted mission in the world", it was a case of the King of Italy entering into treaty relations with one of his own subjects, recognising that subject's independence and sovereignty.

What is important in cases of this kind is the intention of the parties at the date of the agreement, the recognition that they and others give to their agreement, and the legal consequences that they afford it during the years following its signature. In so far as the Indian treaties are concerned, there is little doubt that at the time of signing both parties were using a term that they thought covered their relationship, that both intended to create legal obligations of a permanent character, that both carried out the terms of the agreements for many years, and that practice confirms that, whether they are treaties or not, they constitute mutually binding arrangements which have hardened into commitments that neither side can evade unilaterally.

41. [1935] A.C. 484, 489.
42. Fawcett, **The British Commonwealth in International Law,** 1963, p. 156.
43. 129 L.N.T.S., p. 179.
44. 23 **American Journal of International Law,** 1929, Supplement, p. 187.

In examining the rights and the status of the Canadian Indians it is not enough merely to consider the meaning of equality and discrimination or whether the agreements made with them were treaties. It is also necessary to examine their relations with the federal and the provincial governments and the separation of powers between the centre and the provinces, accepting at the same time Canada's succession to the British Crown.

It is a well established principle of constitutional law that the Crown owns all ungranted lands in a colonial settlement, and this rule also applied in French law at the time of the Seven Years' War. At that time, too, conquest was a recognised mode for the acquisition of title, so that with the defeat of France all French title in the ceded territories passed to the British Crown. However, by the Capitulation of Montreal, 1760[45], "the savages or Indian Allies of His Most Christian Majesty shall be maintained on the lands they inhabit, if they choose to reside there; they shall not be molested on any pretence whatsoever, for having carried arms and served His Most Christian Majesty. . ." This was followed by the Royal Proclamation of 1763[46] by which the "several Nations or Tribes of Indians with whom We are connected and who live under our Protection, should not be molested or disturbed in their Possession of such Parts of our Dominions and Territories as, not having been ceded to or purchased to Us, are reserved to them or any of them, as their Hunting Grounds. . ." Moreover, "whereas Great Frauds and Abuses have been committed in purchasing Lands of the Indians to the Great Prejudice of our Interests, and to the Great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the End that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do . . . strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name . . .; and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give. . ."

In so far as the reserved lands are concerned, this Proclamation has been summarised[47] as providing that "the Indians are not to be molested or disturbed in their possession of such lands; the various colonial governors

45. S. 40, c. **St. Catherine's Milling and Lumber Co.** v. **R.** (1887) 15 S.C.R. 577, 585.
46. R.S.C. 1952, vol. VI, p. 6127.
47. LaForest, **Natural Resources and Public Property Under the Canadian Constitution**, 1969, pp. 110-111.

are not to give grants of such lands; private individuals are not to purchase lands from the Indians; if any persons have settled on such lands, they are to leave them; and if the Indians wish to dispose of such lands, they may only be purchased in the king's name after a meeting of the Indians for the purpose has been held by the governor of the colony where the land is located (or in a proprietary government, in the name of the proprietaries in accordance with directions of the king or the proprietary). . . Broadly, it may be said that the lands reserved under the proclamation include large portions of the area now comprising Ontario, Quebec, the Prairie Provinces, and probably British Columbia; it has even been held that the Maritimes fell within the area reserved by the proclamation, but this seems doubtful."

There is no doubt that the provisions of a royal proclamation may be altered or abrogated by statute, but until that has been done the proclamation remains good law and its provisions are valid regardless of the lapse of time. Since the Queen is still the sovereign of Canada there is no need to examine the intricacies of international law concerning succession to obligations. To the extent that the Proclamation is unamended the Indian lands are still protected and sales to private persons are forbidden. The removal of this restriction is one of the main purposes of the Federal Statement of Policy. At first sight it would appear right and proper that in the present age of freedom and respect for a man's right to deal with his property as he pleases, subject to the overriding interest of the community at large, any restrictions on the freedom of conveyancing should be abolished. However, the history of land speculation and of mortgagees' activities in places like Ireland and the southern states of the United States, as well as in more sophisticated and developed societies leads one to emphasise the words of the Proclamation—"Whereas Great Frauds and Abuses have been committed in Purchasing Lands . . . to the Great Dissatisfaction" of the vendors. In view of the present upsurge of interest in human rights and 'red power' this may well lead "to the Great Prejudice of our Interests", and one is compelled to question the political wisdom of the proposed policy despite the idealistic fashion in which it is dressed.

In the hundred years that elapsed between the Proclamation and Confederation many of the reserved lands had been surrendered by the Indians[48], but in so far as the remainder were concerned the British North America Act in section 91 (24) places 'Indians, and Lands reserved for the Indians' under 'the exclusive Legislative Authority of the Parliament of Canada'. Should the federal government seek to divest itself of this power it can be done in two ways. In the first place, it can simply cease exercising this

48. King's Printer, Ottawa, **Indian Treaties and Surrenders from 1680-1890,** 1905-1912 (3 vols.).

legislative power which would throw upon the provinces the problem of deciding whether the Indians any longer could be treated as such or were to be considered simply as individuals falling within provincial competence in the same way as any other inhabitant of Canada. Provincial failure to regard them in this way might result in allegations of discrimination contrary to the provisions of any provincial Bill of Rights, for the Canadian Bill of Rights, 1960[49], is only valid within the federal government's area of jurisdiction, although R. v. Drybones[50] suggests that inaction by the federal government might place it in the position of having breached the Bill of Rights. The other process would be by way of constitutional amendment of the British North America Act and while, in theory at least, it might be open to the federal government to seek such legislation from Westminster, it is now conventional only to do so with the consent and approval of the provincial governments when the proposed amendment is likely to affect provincial interests or spheres of activity. So long as the Indians remain a special type of Canadian, abandonment by the dominion government of its legislative competence and responsibilities would tend, ipso facto, to place upon the provinces responsibilities which the constitution did not impose upon them and so would, indirectly, affect provincial powers under ss. 92, 93 and 95. However, these powers are permissive and not compulsive.

While s.91 gives legislative authority over the Indians and their lands to the federal government, ss. 109 and 117 recognise that the provinces also own lands which may be inhabited by Indians, although their rights are subject to 'any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same'. It would now appear that "the underlying title to lands reserved for the Indians under the proclamation is vested in the Crown for the benefit of the provinces. The provincial title is subject, however, to the usufructuary title of the Indians thereto. This Indian title is under the control and administration of the Crown in right of the Dominion by virtue of its legislative power over 'Indians, and Lands reserved for the Indians', and in exercising this right of control, the Dominion may accept a surrender. . . But once the Indians surrender their title the province has the complete beneficial interest in the land and the federal government ceases to have the control and administration thereof. In most of the provinces, however, the Dominion government, by virtue of Dominion-provincial agreements, now has the beneficial title in surrendered Indian lands or the power to sell or otherwise dispose of it and use the proceeds for the benefit of the Indians".[51] The point to be emphasised here is that these changes have been effected by agreement and in no way touch the

49. R.S.C. 1960, c. 40 (U.N. **Yearbook on Human Rights for 1960,** p. 48).
50. (1967) 64 D.L.R. (2d) 260.
51. LaForest, op. cit., pp. 114-115.

Dominion government's exclusive power in so far as the Indians as such are concerned.

To a great extent, what are now known as the Indian treaties are the agreements for surrender in return for which the Indians acquired annuities, smaller reserves and special privileges with regard to hunting and fishing over the ceded territories as well as any special privilege, for example concerning medicine chests, detailed in any particular agreement. It is the legal status of these 'treaties' which has already been considered above. But the problem that arises is whether the 'liability' to meet the annuities is that of the provinces or the Dominion as successor to the Crown on whose behalf they were undertaken. In Att.-Gen. for Canada v. Att.-Gen. for Ontario[52] the Privy Council held that in so far as pre-Confederation treaties were concerned these liabilities were merely debts or promises to pay and not trusts, with the result that s.111 of the British North America Act made them the responsibility of the Dominion with the province liable to repay. As to the post-Confederation treaties, there is no doubt that, except where particular arrangements have been made between the Dominion government and the provinces, annuities in respect of surrender are the responsibility of the federal government. On the other hand, as a result of the treaties the province might, as has been seen, find itself bound to respect the Indians' right to hunt and fish in respect of food, regardless of provincial game laws. At the same time it must be recognized that any legislation purporting to interfere with the Indians' right to hunt for food, whether as a result of treaty, or proclamation or as an aboriginal right of historic origin, is legislation concerning Indians and as such solely within federal competence[53].

As to the aboriginal rights of the Indians, these have probably been best summed up by Norris J. A. of the British Columbia Court of Appeal. He pointed out that "The fact of aboriginal rights on conquest or 'discovery' so called of 'new' lands has been recognized throughout the centuries by all the European nations which contended for power on this continent", and maintained that "The Proclamation of 1763 was declaratory and confirmatory of such aboriginal rights." He drew attention to both United States and British decisions relating to native rights, the motive for the recognition of which "varied from regard for fair dealing, through enlightened self-interest, to fear of death and destruction at the hands of savage tribes."[54] He adopted as his own the views of Marshall C. J. in Johnson and Graham's Lessees v. M'Intosh[55]—and the words might well be remembered when recalling that the price paid by the Hudson's Bay Co. for the surrender of their lands by

52. [1897] A.C. 199.
53. **R. v. White and Bob** (1965) 50 D.L.R. (2d) 613.
54. **Ibid.**, p. 630.
55. (1823) 8 Wheaton 543, 589-590, 572-574.

159 Indian chiefs and heads of families of the Nanaimo tribe in 1854 in what is now British Columbia was 636 white blankets, 12 blue blankets and 20 inferior blankets[56]:

> "The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity,[57] however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the right of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.
>
> "When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power.
>
> "But the tribes of Indians inhabitating this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.
>
> "What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing their claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in

56. **Loc. cit.,** n. 53, p. 626.
57. For comments on a 'liberal' application of the rules of international law in the relations between civilized and savage peoples, see Sir William Scott in **The Hurtige Hane** (1801) 3 C. Rob. 324.

the neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred. . .

". . . The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabiitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

"The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

"Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no power could interpose between them.

"In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

"While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantee, subject only to the Indian right of occupancy.

"The history of America, from its discovery to the present day, proves the universal recognition of these principles."

Marshall C. J. was not being egocentric in his references to Europe or to universal recognition. At the time of his judgment there was little attention paid to any powers outside of Europe and it was only powers from that continent that had settled in North America. Moreover, their practice with regard to aboriginal peoples was the same whether they were colonizing America, Africa[58] or Asia.

Norris J. A. emphasised that the judgment was rendered only 60 years after the 1763 Proclamation, to which Marshall C. J. had referred, and which applied equally to Hudson's Bay Co. territories on both sides of what had since become an international boundary. He also referred to the decision of the Canadian Supreme Court in Prince and Myron v. The Queen[59] which approved the reasoning of McGillavray J. A. in R. v. Wesley[60] to the effect that provincial legislation could regulate the Indian's right to hunt for sport on the same terms as that of the white man, "but in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different position from the white man who generally does not hunt for food and was by (the Manitoba game legislation) reassured of the continued enjoyment of a right which he has enjoyed from time immemorial." The learned appellate judge further indicated the necessity for pacification of the landmass after the conclusion of the Seven Years' War, when "it was vital that aboriginal rights be declared and the policy pertaining thereto defined (and t)his was the purpose and the substance of the Royal Proclamation of 1763. The principles there laid down continued to be the charter of Indian rights through the succeeding years to the present time—recognized in the various Treaties with the United States in which Indian rights were involved and in the successive land Treaties made between the Crown and the Hudson's Bay Co. with the Indians"[61]. As recently as 1926 it was held that "the proclamation of 1763 . . . has the force of a statute, and so far therein as the rights of the Indians are concerned, it has never been repealed"[62].

It has often been pointed out that the provisions of the Proclamation have been carried forward into s.91 (24) of the British North America Act, while in Ontario Mining Co. v. Seybold[63] Chancellor Boyd, basing himself upon the decision of the Privy Council in St. Catherine's Milling & Lumber Co. v. The Queen[64], commented that the term 'Lands reserved for Indians' in s.91

58. See, e.g., the decision of the Privy Council in **Amodu Tijani v. Secretary, Southern Nigeria** [1921] 2 A.C. 399, 403.
59. [1964] S.C.R. 81.
60. [1932] 4 D.L.R. 774, 781.
61. **Loc. cit.,** n. 53, 636.
62. **The King v. Lady McMaster** [1926] Ex C.R. 68, 72 **(per** Maclean J.).
63. **(1900) 31 O.R. 386, 395.**
64. **(1888) 14 App. Cas. 46, 59.**

"is sufficient to include all lands reserved upon any terms or conditions for Indian occupation. That is to say, the expression is to be traced back to the Royal Proclamation of 1763, is not to be limited to reserves set apart under the provisions of a treaty, but is of larger scope covering all wide and waste lands in which the Indians continue to enjoy their primitive right of occupancy even in the most fugitive manner."

A further point that is of significance relates to the personal and territorial scope of the Proclamation and hence of the aboriginal rights. It is perhaps sufficient to refer once again to the comment of Norris J. A.[65]:

> "The Proclamation while referring principally to Indians who were at the time known to the British, brought within its purview all Indians on lands over which Great Britain claimed dominion, that land being the unlimited west—the territory which was then and for over a century after the Treaty known generally as Indian Territory. This land was known to exist, although a great part of it had not been explored. The Proclamation is to be construed in accordance with the common understanding of the British expansionists of those days, who claimed the extension of dominion not in the terms of precise definition or of survey or of British settlement. In considering the applicability to Vancouver Island of the Proclamation, we are not concerned with the validity of such claim, but merely that the territory was claimed and that in its very terms the Proclamation covered all this territory. . . If the conception of the British claim and continual extension of exploration be kept in mind, the use of the present tense in the expression 'with whom We are connected, and who live under our Protection' is easily understood as referring to all the Indians on all territory claimed. The use of the term 'for the present' presages the anticipated extension. . . The Proclamation was made on the basis of a claim to dominion and its protective provisions became applicable in fact to Indians as their lands (the Indian Territory) came under the de facto dominion of representatives of the British Crown."

The rights, particularly those referring to hunting, embodied in the Proclamation are 'inalienable except by surrender to the Crown'[66]. Since it is presumed that the Crown acts in good faith it is to be assumed that these rights would be terminated only by agreement between the Crown and those entitled as beneficiaries. On the other hand, since the Dominion parliament has the sole right to legislate on Indian affairs and, subject to the terms of the British North America Act, its powers are untrammelled, it is within the power of that Parliament to abrogate Indian rights by legislation, and particularly is

65. **Loc. cit.**, 639, 641, 644 (italics in original).
66. **Att. Gen., Quebec v. Att. Gen., Canada** (1921) 56 D.L.R. 373, 377 **(per Duff J.).**

this so in view of the fact that the courts have construed the Proclamation as if it were a statute and the Canadian parliament is not bound by legislative acts of its predecessors. However, the fact remains that any such cancelling legislation could not have the effect of increasing the obligations of the provinces in so far as they are not already liable for burdens concerning the Indians, over and above those they bear in respect of other inhabitants.[67] Such legislation would, therefore, leave the Indian 'unprotected' and constitute a clear breach of faith on the part of the Crown.

On the other hand, there is nothing to prevent the provinces agreeing to participate in the administration of Indian affairs, but "agreements of that sort do not in any sense amount to a 'transfer of jurisdiction'. They are simply an example of the Crown in right of Canada employing a provincial agency to carry out its obligations and duties under the Indian Act. The obligations and duties are as defined in the Federal Law. Control would be retained by the Crown in right of Canada through such devices as the setting of standards, the right to inspect, the right to cancel out the agreement if found unsatisfactory, but above all, through the fact that authority to do anything at all comes from the agreement with the Federal Government, and not from the laws enacted by the provincial legislature. Hence, there is no transfer of jurisdiction—the province is being used as an agency for the accomplishment of a Federal objective,"[68] and this statement on the nature of jurisdiction applies to all treaty Indians[69] whether living on or off the reserves[70]. Since the province concerned would be acting only as an agent, it would not be possible in this way, without an amendment of the British North America Act, to increase its direct liabilities or to mpose any financial burden upon it. The latter would remain the responsibility of the federal authority. It should be borne in mind that this agency potential applies to all the rights and duties of the federal government and therefore extends to all Indians covered by ss. 11 and 12 of the Indian Act, regardless of whether they are to exclude most métis as well as some regarded in common parlance as Indians. This differentiation was taken note of in the Alberta Government's Statement of General Policy regarding Services to People of Indian Ancestry[71], in which

67. See, e.g., Clement, **Canadian Constitution,** 1916, pp. 679-680.
68. **Report of Federal-Provincial Conference on Indian Affairs,** 1964 (App. J., prepared by Federal Dept. of Justice). See, however, **A.G., Nova Scotia** v. **A.G., Canada** [1951] S.C.R. 31 in which it was held that the use of the word "exclusively' in ss. 91 and 92 of the B.N.A. Act precludes the possibility of delegation of legislative power from the federation to the provinces, or **vice versa,** although this is not true where the delegation relates to existing legislation.
69. In accordance with **R.** v. **Syliboy** [1929] 1 D.L.R. 307, treaty Indians are direct descendants of the tribe with which the treaty was made.
70. **Loc. cit.,** n. 68, p. 17 (statement by Mr. Tremblay, Minister of Citizenship and Immigration).
71. White Paper on Human Resources Development, 1967, pp. 79-80.

it was proposed "that the Government of Canada and the provincial governments develop a comprehensive agreement which will supersede all previous separate agreements, and which will make it financially possible for provincial and municipal governments to extend all of their services to Indian people. Under this comprehensive agreement, existing separate services and facilities to Indian people would be phased out where provincial and municipal services are available. It is proposed that the Government of Canada accept total financial responsibility for all programs and services extended to registered Indians[72] with reserve status . . .; and that the provincial governments be financially responsible for programs and services to all other Indian people to the same degree as it is to all other residents."

Constitutional difficulties concerning jurisdiction arise not merely with regard to the aboriginal and Proclamation rights of the Indians, but also in connection with rights under the treaties, a matter which is of some significance since s.87 of the Indian Act provides that "subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act." It has already been pointed out that the word 'treaty' and the agreement to which it refers are not used in the technical sense of that term in international law. Nevertheless, the arrangement made by the Crown or the Hudson's Bay Co. as its representative with Indian tribes is at least a contract which, in the light of its historical significance and development, is entitled to more than the respect normally afforded to a contract, particularly one which amounts to a grant by the Crown, and has come in practice to be almost as hallowed as an international arrangement.

This special view of the treaties has constantly been accepted by Canadian judges and the Privy Council, and is also to be found in the writings of eminent historians. Thus, in his **History of the Canadian West to 1870-71,** A. S. Morton writes[73]:

> "The promise which won over the warlike Five Nations was that they would enjoy their territory undisturbed, and that no lands were to be taken from them but by formal purchase of His Majesty the King. Thus they would be protected from the dreaded encroachment of colonialists. To us who have experienced the peaceful working out

72. Indian Act, s. 11.
73. 1939, p. 258.

of such a policy from the purchases by the Hudson's Bay Company of the rights to build their forts down to the long succession of Indian treaties which preceded the settlement of the North-West, this policy appears to be doing no more than justice to the Indians, quite apart from the treaties which promised it to them—no mere scraps of paper, surely. So far from precluding the manifest destiny of the White Race on this continent, it really provided for an orderly and peaceful expansion."

Similarly, Lord McNair in his great work on **The Law of Treaties,** when dealing with problems of interpretation and application, quotes[74] with favour "the Supreme Court of the United States (which) has laid down the indulgent rule which requires treaties made with Indian tribes to be construed 'in the sense in which they would naturally be understood by the Indians'[75]", and everything we know about the Indians and treaties suggests they were understood by the tribes, as they have consistently been by their descendants, as constituting legal arrangements binding upon the Crown for all time.

Norris J. A. was fully conscious of the special status of the Indians, including their rights under the treaties, which "confirmed the Indians in their aboriginal rights of hunting and fishing, these being the rights essential to the survival of the Indians. These rights have never been surrendered or extinguished"[76]. It is true that he was dealing with a provincial attempt to abrogate these rights, but even the federal government might bear in mind his comment that "it is now too late for this Province alone to attempt to take away rights which the Indians have had from time immemorial"[77]. He envisaged the need for joint action between the province and the federal government, but it might with equal force be maintained that similar joint action would be necessary between the federal government and the Indians, while as has been seen any attempt by the federal government to abandon its obligations so as to increase those of the provinces would require consent by the latter.

At the same time, one should not overlook the statement in the Schedule of the Order in Council of 1871 effecting British Columbia's entry into Confederation. In the address from the Canadian Senate and House of Commons to the Queen it was proclaimed that "the charge of the Indians, and the trusteeship and management of the lands received for their use and benefit, shall be assumed by the Dominion Government and a policy as

74. 1961, p. 470.
75. **Jones v. Meehan** (1899) 175 U.S. 1.
76. **Loc. cit.,** n. 53, p. 630.
77. **Ibid.,** p. 648.

liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union''[78].

Perhaps one may leave R. v. White and Bob, undoubtedly one of the most important Canadian decisions on the rights of Indians, with Norris J. A.'s elaboration[79] of Davey J. A.'s view on the nature of the treaties, and it will be possible to close the general discussion on the treaties at this point:

> "The question is . . . to be resolved not by the application of rigid rules of construction without regard to the circumstances existing when the document was completed nor by the tests of modern day draftsmanship. In determining what the intention of Parliament was at the time of the enactment of s.87 of the Indian Act, Parliament is to be taken to have had in mind the common understanding of the parties to the document at the time it was executed. In the section 'Treaty' is not a word of art and . . . it embraces all such engagements made by persons in authority as may be brought within the term 'the word of the white man' the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and co-operation of the native tribes and ensuring that the colonists would be protected from death and destruction. On such assurance the Indians relied. . . (O)n numerous occasions in modern days, rights under what were entered into with Indians as solemn engagements, although completed with what would now be considered informality, have been whittled away on the excuse that they do not comply with present-day formal requirements and with rules of interpretation applicable to transactions between people who must be taken in the light of advanced civilization to be of equal status. Reliance on instances where this has been done is merely to compound injustice without real justification at law. The transaction in question here was a transaction between, on the one hand, the strong representative of a proprietary company under the Crown and representing the Crown, who had gained the respect of the Indians by his integrity and the strength of his personality and was thus able to bring about the completion of the agreement, and, on the other hand, uneducated savages.[80] The nature of the transaction itself was consistent with the informality of frontier days in this Province and such as the necessities of the occasion and the customs and illiteracy of the Indians demanded. The transaction in itself was a primitive one — a surrender of land in exchange for blankets to be divided

78. R.S.B.C. 1952, vol. 6, pp. 135-143, para. 13.
79. At pp. 648-649.
80. Cp. comments of Gray J. in **Jones v. Meehan, loc. cit.,** n. 23 above.

between the Indian signatories according to arrangements between them—with a reservation of aboriginal rights (—as was usual in most of the treaties with the Indians—), the document being executed by the Indians by the affixing of their marks. The unusual (by the standards of legal draftsmen) nature and form of the document considered in the light of the circumstances (for example) on Vancouver Island in 1854 does not detract from it as being a 'Treaty'."

In so far as a parallel may be drawn from international law concerning the unilateral denunciation of a treaty with a native people, it must be borne in mind that at the present time this denunciation is being carried out by the latter. As the colonial territories have achieved their independence, the newly independent governments have claimed the right to decide which of the former treaties concerning their territory are to continue and which be denounced. Unlike the Indian treaties, these have been contracted between the former ruler and third powers and the latter have, for the main part, acquiesced in the denunciation. Should a ruling power today decide to denounce or unilaterally evade its obligations under similar treaties made with the indigenous inhabitants of its territory, it is almost certain that it would be made the recipient of the obloquies of the world gathered at the United Nations in the name of human rights.

Current discussions concerning the Indians revolve around the Indian Act, for this tends to define the various rights of those Indians who are within it. Nevertheless, its significance should not be exaggerated in any consideration of the rights of the federal government and the provinces respectively. In addition, while the Act provides for federal competence for those Indians to whom it applies and by s. 109 stipulates that a person concerning whom an order for enfrachisement has been made is "deemed not to be an Indian within the meaning of this Act or any other statute or law", this provision is not so far-reaching as it sounds. The Indian Act is a Canadian statute and cannot amend the British North America Act, so that federal power still operates under s. 91 (24) even with regard to enfranchised Indians.

Even without repeal of the Indian Act, its scope may be radically reduced. By s. 4 the Governor in Council may declare by proclamation that, with the exception of ss. 37 to 41 relating to land surrenders, the Act no longer applies to "any Indians or any group or band of Indians, or any reserve of any surrendered lands or any part thereof", and presumably what he can do for particular Indians or their lands he can do generally. As it is, large portions of the Act do not apply to Indians living off the reserves or off lands belonging to the Crown in right of Canada or a province. By such proclamation it would be possible for the Minister of Citizenship and Immigration, in whose jurisdiction the Act falls, to divest himself of all the practical

consequences of his responsibility. In the same way it would be possible, by operation of s. 35 of the Act, to liquidate the reserves even without the agreement of the Indians. This section authorises the extension to the reserves by way of Order in Council of any Canadian or provincial act of parliament incorporating a statutory power of expropriation, payment therefor being made to "the Receiver General of Canada for the use and benefit of the band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers" just mentioned.

Among the reasons put forward by the federal Government for termination of the special status of Indians is the contention that their lands must be freed and made available for mortgage purposes. This implies that at present the Indians are unable to make use of their land as fully as might otherwise be desirable and are unable to raise funds they may require because of their inability to pledge their lands. This, however, ignores the extent to which the Indian is at present able to do at least some of these things. Thus, by s. 58 he may apply to the Minister to effect a lease of land of which he is lawfully in possession without such land being surrendered, so long as the lease is for the benefit of the Indian. Similarly, under s. 69, "the Minister of Finance may . . . advance to the Minister out of the Consolidated Revenue Fund such sums of money as the Minister may require to enable him" to make loans even to individual Indians for a large range of purposes most of which are connected with agriculture, fishing, or native handicrafts, but also for motor vehicles and 'any other equipment', and also for any other matter prescribed by the Governor in Council. The total of the sums outstanding by way of such advances is however limited to one million dollars.

The Indian Act does not attempt to take Indians out of the scope of the ordinary law. What it seeks to do is to preserve to them such additional rights as may be necessary in view of their less developed status or which they may have acquired by treaty or some other Act — and by judicial interpretation the Proclamation of 1763 is treated as if it were an Act of parliament. This position is given legislative recognition by s. 87 when it provides that "subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act."

It would appear that the Indian Act does not render Indian rights as 'vested' as is sometimes alleged. Even without amendment or repeal, much of the protection seemingly conferred upon the Indian may be removed

by virtue of the exercise of powers granted by the Act to the Governor in Council or the Minister.

Unlike the British North America Act, the Indian Act is a piece of federal legislation similar to any other statute passed by the Canadian Parliament and it may be repealed in exactly the same way. Prima facie, however, the rights of Indians under the 1763 Proclamation and the various treaties would remain valid. But the federal government would then be able to pass legislation terminating the treaties and the courts would, in accordance with constitutional law, be obliged to give effect to the legislation thus invalidating all the rights that the Indians believe themselves to be entitled to enjoy, for the Proclamation could be repealed in the same way, as could any aboriginal rights to fish or hunt. A problem would arise with regard to such rights as are enjoyed by Indians under international treaties like the Jay Treaty as distinct from the so-called treaties made between the representatives of the Crown and the Indians. Despite the decision in Francis v. The Queen[81] when the Supreme Court held that a statute overrode such international treaty rights, it would appear that Indians enjoying rights under such a treaty would continue to enjoy such rights, in the same way as do their brethren in the United States. If the Supreme Court were to follow the normal rule of interpretation that, "while in a case of clear conflict, the statute must be held to override the treaty, . . . in construing a statute which is ambiguous or capable of two interpretations, that interpretation ought to be favoured which will not involve a breach of treaty provisions. To state it another way, a statute will be construed so as not to violate a treaty unless the statute expressly or by necessary implication discloses that parliament intended to do so", it should be able to evade the rigours of this decision by way of distinguishing, especially as "the legislation in question in the Francis case did not expressly require breach of the Jay Treaty for nowhere in the legislation were Indians referred to"[82]. Moreover, there are already indications that in some fields at least, such as tax and expropriation, the Supreme Court does not consider itself unquestioningly limited by precedent, while it is not beyond the realm of possibility that, following the new practice of the House of Lords and other senior tribunals in common law jurisdictions, the Court may soon itself be prepared to disregard such precedents as it considers wrong or obsolete. Even if this should not happen, and the Court continue to apply legislation contrary to such an international treaty, the Government of Canada might find itself facing international claims by the other party to such a treaty, as Canada itself presented claims on behalf of the Cayuga Indians. And if Indians protected by such international treaties continued to enjoy

81. [1956] S.C.R. 618.
82. **A Survey of the Contemporary Indians of Canada** (The Hawthorn Report), vol. 1, 1967, pp. 219-220.

their rights under these treaties, the Government would find its difficulties with the Indians increased, for this would mean that a minority, with whom the Crown had never entered into any agreement, was entitled to rights and privileges denied to the majority with whom such agreements had been made.

On the other hand, the new tendency in the United Nations to talk of the fundamental rights of 'peoples' rather than of individuals[83] may lead to agitation by the newer members, who are themselves liberated from colonial rule and 'coloured', on behalf of their suppressed brethren who must be granted equal rights and relieved of all traces of discrimination. However, since the Indians may consider that the 'discrimination' to which they are subjected is in the nature of 'privileges' rather than 'disabilities', they may not be quite so willing to see their case taken up in this way. It will indeed be strange if the anti-colonialist segment in the United Nations finds itself agreeing with the Canadian Government in regarding the special status of the Indians as discrimination, while the 'victims' regard it as their guarantee of legal rights and perhaps their ticket to equality.

Regardless of this issue of international politics, there is the fundamental problem of the attitude of the Indians themselves, particularly at a time when discontent appears to be growing and groups of dissidents seem likely to take advantage of any group dissatisfaction on which they may be able to capitalize. At the same time, it must be recognized that, despite the pleas for equal treatment, national and racial groups today demand full recognition of their independent and individual characteristics. It is unlikely that any Indian group would today go so far as the spokesman for the Six Nations in 1744 at the time of the negotiation with the Government of Virginia of the Treaty of Lancaster. In declining the offer of the commissioners to send six of the chiefs' sons to college at Williamsburg to learn the education of the white man, the spokesman said:

> "We are convinced . . . that you mean to do us good by your proposal and thank you heartedly. But you, who are wise, must know that different nations have different conceptions of things; and you will not therefore take it amiss if our ideas of this kind of education happen not to be the same with yours. We have had some experience of it; several of our young people were formerly brought up at the colleges of the northern provinces; they were instructed in all your sciences; but, when they came back to us, they were bad runners, ignorant of every means of living in the woods, unable to bear either cold or hunger, knew neither how to build a cabin, take a deer, nor kill an

83. See, e.g., Green, 'The Impact of the New States on International Law', 4 **Israel** L.R. 1969, p. 27, at pp. 40 et seqq.

enemy, spoke our language imperfectly, were therefore neither fit for hunters, warriors, nor counsellors; they were totally good for nothing.

"We are however, not the less obligated by your kind offer, though we decline accepting it; and, to show our grateful sense of it, if the gentlemen of Virginia will send us a dozen of their sons, we will take care of their education, instruct them in all we know, and make men of them."[84]

Nevertheless "it remains a sore point with the present generation (of Indians) which feels that (the 1752 treaty with the Mick Mack Indians) and other agreements made in those days are binding on Canada. These agreements hold a special place in the hearts and minds of the Indians because they represent, for the Indians, a recognition of their identity as a people whose roots and traditions stretch far back into Canadian pre-history."[85]

In view of this, it matters little whether the agreements were treaties in the narrow sense of the word. The weaker party always regarded them as such, while the stronger party and its legal interpreters have for more than a century accepted that they were in the nature of treaties and that the provisions embodied therein created legal obligations for the Crown and its representatives. Legally, there is no doubt that they can be abrogated, and since they are not true treaties this can be done unilaterally by the Crown. Such action would amount to bad faith and be regarded as such by the Indians, by large sectors of public opinion and my many members of the United Nations—in today's world it is no good reminding one's critics of the statement in **Matthew:** "Why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye?"[86]

If the Canadian Government is to remain true to its own past practice in so far as Indian rights whether under the treaties or not are concerned, it is essential that any alteration of these rights must be the result of equal negotiation between the Crown and the Indians, and if the latter are not yet prepared to come to terms it may be wiser from the political point of view for the Government to recognize the status quo, while working for revision. In the same way, even if the Government could achieve some measure of disengagement by non-fulfilment of its powers under the British North America Act or the Indian Act, thus throwing the Indians upon the charity of the provinces, it would be wiser for the sake of the federation that it achieve full provincial agreement to any amendment it may desire in the separation of powers between

84. Cited in B. Franklin, **Remarks Concerning the Savages of North America,** 1784.
85. **Hawthorn Report,** n. 82 above, p. 237 (citing Indian Affairs Branch officials).
86. **Ch. 7, v. 3.**

the centre and the provinces. It may, therefore, be wise from a political and constitutional point of view to treat the Indian question as part and parcel of the whole problem of constitutional revision, rather than attempt to deal with it on its own or in a way that the provinces can only regard as high-handed. To attempt to maintain that the rights of the Indians result in discrimination against them or are evidence of a denial of their equality in the sense that their status is reduced thereby, is to indulge in an excessively narrow view of the meaning of words, of the purpose of equality and of the nature of discrimination. It is no longer a question of the good faith of the Crown that is involved but the good faith and repute of the Government of Canada—and this in a field in which reason as well as honesty demands that care be taken not to aggravate a situation which could easily erupt into a civil disturbance that would make the Riel Rebellion of 1884-5, or the Slaves' Revolt under John Brown, look like kindergarten picnics.

In its survey of Canadian Indians, the **Hawthorn Report** states:

> "An evaluation of Indian status and the consequences which have been attached to it by governments makes crystal clear that there is a remarkable degree of potential flexibility or 'play' in the roles which have been, and in the future could be, assumed by either level of government. For the entire history of Indian administration this play has been exploited to the disadvantage of the Indian. The special status of the Indian people has been used as a justification for providing them with services inferior to those available to the Whites who established residence in the country which once was theirs. Whether Indians should receive the same rates of social assistance as non-Indians, whether they should have the franchise in federal or provincial elections, whether their children should be given the same services from Children's Aid Societies as Whites receive, whether Indians should have the same liquor privileges, whether Indian schooling should be segregated or integrated, whether Indian local governments should be considered as municipalities for the purpose of numerous provincial grant-aided programs—these and numerous other queries share the common element of being policy questions unrelated in any inherent way to Indian status as such. These questions pertain to the consequences which are attached to Indian status. It should be noticed that on the whole the consequences simply reflect what governments in their wisdom decide they shall be. (Thus,) up until 1960 . . . Indian status was held to be incompatible with possession of the federal franchise. Since 1960 this particular consequence of Indian status has been eliminated by a change in federal policy which extended the franchise without interfering with Indian status.

> In general, it is in this area of the consequences which have been attached to Indian status that the most important changes have been, and will continue to be, made. The consistency with which Indian status was used in the past to deprive the Indian of services routinely provided to non-Indians is now breaking down. The process, however, is far from complete."[87]

Where the danger lies, however, is that in making the process complete the rights of the Indian as traditionally understood, and the desires of the Indian as an equal member of society will be disregarded in blind worship of the god 'equality'—and this is what the Statement of the Government of Canada on Indian Policy, 1969, appears likely to achieve.

87. At p. 253.

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